ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2017-0096; FRL-10020-01-R9]

Approval of California Air Plan Revisions, Eastern Kern County Air Pollution Control District and Imperial County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Eastern Kern Air Pollution Control District (EKAPCD) and Imperial County Air Pollution Control District (ICAPCD) portion of the California State Implementation Plan (SIP). These revisions were submitted by the California Air Resources Board (CARB) in response to EPA's June 12, 2015, finding of substantial inadequacy and SIP call for certain provisions in the SIP related to affirmative defenses applicable to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is finalizing approval of the SIP revisions because the Agency has determined that they are in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or the Act) and correct deficiencies identified in the June 12, 2015 SIP call.

DATES: These rules will be effective on [**Insert date 30 days after date of publication in the *Federal Register***].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R09-OAR-2017-0096. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov*, or please contact the person identified in the **FOR**

FURTHER INFORMATION CONTACT section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, EPA Region IX, (415) 947-4125, *vineyard.christine@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to the EPA.

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I. Background

On February 22, 2013, the EPA issued a *Federal Register* notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.[1] For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA

[1] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," hereafter referred to as the "2015 SSM SIP Action."[2] The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemptions and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. The EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

The EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.[3] Importantly, the 2020 Memorandum stated that it "did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act." Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to EKAPCD and ICAPCD in 2015. It also did not alter the EPA's prior proposal from 2017 to approve the EKAPCD and ICAPCD SIP revisions at issue in this action. The 2020

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[2] 80 FR 33839.

[3] October 9, 2020, memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,'' from Andrew R. Wheeler, Administrator.

Memorandum did, however, indicate the EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether the EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced the EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).[4] As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including overburdened communities, receive the full health and environmental protections provided by the CAA.[5] The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the Agency takes action on SIP submissions, including EKAPCD's and ICAPCD's SIP submittal, provided in response to the 2015 SIP call.

With regards to EKAPCD and ICAPCD, the SIP call identified Rules 111 because the rules contained improper affirmative defenses for excess emissions during startup, shutdown, and malfunction events. On May 1, 2017 (82 FR 20295), the EPA proposed to approve removal of Rules 111 from the California SIP.

Local Agency	Rule #	Rule Title	Rescinded	Submitted
EKAPCD	111	Equipment Breakdown	11/10/16	12/06/16

[4] September 30, 2021, memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.
[5] 80 FR 33985.

Local Agency	Rule #	Rule Title	Rescinded	Submitted
ICAPCD	111	Equipment Breakdown	09/22/16	03/28/16

As discussed in the proposal, EPA proposed to approve the removal of Rules 111 from the EKAPCD and ICAPCD portions of the California SIP because such removal is consistent with CAA requirements and would correct the deficiency identified by the Agency in the 2015 SSM SIP Action. EKAPCD and ICAPCD are retaining the affirmative defenses solely for state law purposes, outside of the EPA approved SIP. Removal of the affirmative defenses from the SIP is also consistent with the EPA policy for exclusion of "state law only" provisions from SIPs and will serve to minimize any potential confusion about the inapplicability of the affirmative defense provisions in Federal court enforcement actions.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. EPA acknowledges that over four years have elapsed since the comment period closed. No additional comment period is needed because nothing in the intervening time period – including the issuance and subsequent withdrawal of the 2020 Memorandum – changed the basis for EPA's proposed action or the public's opportunity to view and comment on that basis. Accordingly, the May 1, 2017 proposal provided the public with a full opportunity to comment on the issues raised by the proposed action. During this period, we received one comment. A summary of the comment from the SSM Coalition ("commenter") and EPA's response is provided below.

Comment: The commenter states that the approach EPA took in the SSM SIP action is based on an improper view of EPA's SIP call authority, an inappropriate view of the flexibility Congress gave states to develop SIPs, an incorrect reading of the United States Court of Appeals for the District of Columbia (D.C. Circuit) decision in *Sierra Club v. EPA*, an incorrect reading of the definition of "emission limitation and emission standard" in CAA section 302(k), and

"unreasonable or insufficiently supported assumptions" about SSM events and emissions during SSM periods. The commenter notes that these objections to EPA's approach were stated in detail in comments on the proposed SSM SIP action and in briefs filed in the D.C. Circuit in consolidated challenges to the SSM SIP action, which the commenter incorporates by reference into its comment letter.

Pointing to the various objections that the SSM Coalition and others raised about the SSM SIP action, the commenter concludes that it is inappropriate for the EPA to finalize its proposed approval of EKAPCD's and ICAPCD's response to the SSM SIP call until litigation before the D.C. Circuit is resolved. In support of this claim, the commenter points to statements made in 2017 by the Trump Administration about reviewing the underlying basis of the SSM SIP action and suggests that EPA withdraw the proposed action on EKAPCD's and ICAPCD's Rules 111 because there may be a different rationale for EPA's position on the California SIP revisions after review of the underlying legal and policy issues by the D.C. Circuit and/or EPA.

Response: The EPA respectfully disagrees with this comment. To the extent that the commenter is incorporating by reference comments made during the public comment period on the proposed SSM SIP action, we point to our responses in the 2015 final rulemaking and note that the comments were carefully considered before finalizing that action. The comments on the proposed SSM SIP action do not alter the basis for our proposed or final actions on the EKAPCD and ICAPCD submittals, which are based on the 2015 SSM SIP final rulemaking.

The Agency also acknowledges the commenter's concern that there exist pending challenges to the 2015 SSM SIP action in the D.C. Circuit. However, there is no requirement or expectation that EPA must postpone action while awaiting a court decision. EKAPCD and ICAPCD have submitted SIP revisions to the Agency that are fully approvable for the reasons outlined in the 2017 proposal notice. As a result, EPA has determined that it is appropriate to take action to approve the EKAPCD and ICAPCD SIP revisions in accordance with applicable CAA requirements. Under the CAA, the Administrator is required to approve a SIP submission

that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). The commenter has pointed to no new alleged deficiency or other aspect that would lead the Agency to determine that the SIP revisions should be disapproved or that full approval of the SIP revisions is not otherwise appropriate.

As we recently reaffirmed in the 2021 Memorandum, EPA is implementing policy consistent with that outlined in the 2015 SSM SIP Action. That policy aligns with previous court decisions, including the D.C. Circuit's ruling in 2008, which found that inclusion of SSM exemptions in section 112 standards is not allowed under the CAA due to the generally applicable definition of emission limitations.[6] Additionally, in 2014 the D.C. Circuit vacated a provision in EPA regulations that allowed an affirmative defense if it met specific criteria. The court stated that EPA lacked authority to create such a defense because it would impermissibly encroach upon the authority of Federal courts to find liability or impose remedies.[7] It was in light of the 2008 and 2014 court cases, as well as concerns about the public health impacts of SSM, that led EPA in its 2015 action to clarify and update its SSM policy to explain that automatic exemptions, discretionary exemptions, overly broad enforcement discretion provisions, and affirmative defense provisions like the ones at issue in this action, will generally be viewed as inconsistent with CAA requirements.

III. EPA Action

No comments were submitted that change our assessment of the rules as described in our proposed action. Therefore, as authorized in section 110(k)(3) of the Act and for the reasons identified in the 2017 proposal, the EPA is fully approving the removal of these rules from the EKAPCD and ICAPCD portions of the California SIP. The Agency's final approval of this submission fully corrects the inadequacies in the EKAPCD and ICAPCD portions of the California SIP that were identified in the EPA's 2015 SSM SIP Action.

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[6] *Sierra Club v. Johnson* 551 F.3d 1019 (D.C. Cir.2008).
[7] *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).

IV. Incorporation by Reference

In this document, the EPA is amending regulatory text that includes incorporation by reference. As described in section I of the preamble and as set forth below in the amendments to 40 CFR part 52, EPA is removing provisions from the Kern County and Imperial County portions of the California State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. The EPA has made and will continue to make the State Implementation Plan generally available through *www.regulations.gov* and at the EPA Region 9 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. section 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the ***Federal Register***. A major rule cannot take effect until 60 days after it is published in the ***Federal Register***. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [**Insert date 60 days after date of publication in the *Federal Register***]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 15, 2022

Martha Guzman Aceves,
Regional Administrator,
Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq*.

Subpart F – California

2. Section 52.220 is amended by adding paragraphs (c)(47)(iii)(C) and (c)(74)(i)(C) to read as follows:

§52.220 Identification of plan-in part.

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(c) * * *

(47) * * *

(iii) * * *

(C) Previously approved on October 24, 1980, in paragraph (c)(47)(i)(A) of this section and now deleted without replacement Rule 111, "Equipment Breakdown."

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(74) * * *

(i) * * *

(C) Previously approved on January 27, 1981, in paragraph (c)(74)(i)(A) of this section and now deleted without replacement Rule 111, "Equipment Breakdown."

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[FR Doc. 2022-17936 Filed: 8/19/2022 8:45 am; Publication Date: 8/22/2022]